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IN THE

Supreme Court of the United States

October Term 1951

No. 266

EDITH O. MASKE, *Petitioner,*

v.

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.
(Also known as W.M.&A. Motor Lines, Inc.)
a body corporate

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, EDITH O. MASKE, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, reversing the judgment of United States District Court for the District of Columbia, following upon a $20,000 verdict in her favor in a personal injury suit, and directing the entry of judgment in favor of respondent on the basis of a motion for directed verdict made at the close of respondent's case.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 181) is reported at ..... U.S. App. D.C. ....., ... F. (2d) ..... There was no opinion prepared on the denial of petition for rehearing (R. 194), nor is there any opinion of the trial court.

JURISDICTION

The judgment of the United States Court of Appeals was entered May 17, 1951 (R. 182), and a timely petition for rehearing (R. 183) was denied June 18, 1951 (R. 194). The jurisdiction of this Court is invoked under Section 1254 (1) of the Judicial Code (28 U.S.C. 1254 (1)).

QUESTIONS PRESENTED

Petitioner, relying on the res ipsa loquitur doctrine, sued for personal injuries received when the bus on which she was a passenger came to a sudden and unexpected stop. Respondent offered evidence admitting the sudden stop, but purporting to show the bus driver was attempting to avoid a collision with another vehicle. Petitioner denied seeing the other vehicle allegedly involved. Respondent's motion for a directed verdict at the close of *all* of the evidence was denied and a $20,000 verdict returned. Remand by the court below with directions to enter judgment for respondent raises these questions:

1) Whether applicability of the res ipsa loquitur doctrine in a common carrier case permits the entry of a directed verdict against a passenger.

2) Whether the inference of negligence permitted by the res ipsa doctrine can be vitiated by the carrier's explanation for the accident without regard to whether that

explanation is believed or accepted by the jury or trial court.

3) Whether a directed verdict can be ordered by an appellate court where plaintiff admittedly established a prima facie case and where there is conflicting evidence.

4) Whether a common carrier passenger properly relying on the res ipsa doctrine is foreclosed from recovery or a jury's evaluation of the carrier's proferred explanation of the accident, because the passenger does not have affirmative independent evidence to rebut the alleged explanation.

5) Whether petitioner has been denied her right of trial by jury because her credibility was doubted by the Circuit Court of Appeals, although not by the jury or the trial court.

STATEMENT

Petitioner, on January 14, 1949, filed suit against respondent for personal injuries sustained on July 9, 1947, while she was a fare-paying passenger on one of respondent's buses then operating in downtown Washington. D. C. Both at pretrial (see Pretrial order at R. 5-6) and trial (see R. 166-174) petitioner relied on the doctrine of res ipsa loquitur as ground for recovery, and the plaintiff's case was submitted to the jury on that theory (R. 170-173).

Conceding, in effect, that by proper application of the res ipsa loquitur doctrine petitioner had made out a prima facie case against it, respondent did not move for a directed verdict at the close of petitioner's evidence. Instead, respondent offered evidence to show that its driver had to stop suddenly to avoid collision with a taxi which allegedly suddenly drove out in front of the bus (R. 48, 56, 61, 124). At the close of *all* the evidence,

respondent moved for a directed verdict (R. 166) which was denied (R. 166). The jury returned a verdict of $20,000 in petitioner's favor (R. 175). After denial of a motion for new trial and for judgment N.O.V. (R. 9-10) respondent noted an appeal to the court below (R. 10). The reversal below followed (R. 182), and a petition for rehearing was thereafter denied (R. 194).

Briefly, the evidence before the jury was as follows:

Petitioner testified that on July 9, 1947 she was a passenger on defendant's bus which was proceeding in an easterly direction on E Street, N.W. in the District of Columbia in the middle of three east-bound lanes (R. 15-16). Petitioner was sitting in the long seat directly behind the driver facing the center aisle; the bus was crowded, and many passengers were standing (R. 16). The bus stopped at 7th & E to take on passengers and then started up and crossed 6th Street on the green light, picking up speed as it went along (R. 17). Just after the bus crossed 5th Street, without any warning it came to a sudden, complete and violent stop, jarring and throwing most of the passengers who were on the bus (R. 17-18, 36, 50, 52, 56, 61, 124, 132). As a result, another passenger, Mrs. Gladys Page, who was standing holding onto a pole, was hurled headlong toward the floor of the bus and, as she grabbed for a pole near petitioner to stop her forward movement, she ground the heel of her shoe into the top of petitioner's right foot, just below the ankle (R. 17, 31, 36, 52). Petitioner further testified that she saw no reason for the bus to stop, although she was looking toward the front of the bus (R. 33-34). [It is important to note (1) that she was sitting behind the driver on a seat which faced the center aisle (not the front) of the bus, so that her view of the front was necessarily limited, and (2) that the alleged taxicab was supposed to have cut in very suddenly from the right side of the bus which would be very difficult for a seated

passenger in her position to observe particularly since the roof of the cab was slightly lower than the front window of the bus (R. 58.)] On cross examination petitioner testified as follows (R. 33-34):

"Q Mrs. Maske, did you see this car pull out in front of the bus that had stopped?

A No sir, I did not.

Q You don't deny that that did not happen?

A No sir, I don't.

Q Were you looking ahead?

A Yes sir, I was watching that stop sign, traffic light, I should call it.

Q Were you looking in the same direction the bus was travelling?

A Yes, sir.

Q You say there was no car there?

A I wouldn't state positively there wasn't any car there because I was hurt.

Q Did you look before the accident?

A But I didn't see a car there. I looked before the accident, and I didn't see any.

Q Did you again look after the accident?

A I was hurt so badly that I didn't look, no sir.

Q Were you looking at the time the bus came to the sudden stop as you have characterized it?

A Yes sir, I was.

Q And there was no car there then?

A No, sir.

The defense consisted of the testimony of three witnesses who were passengers on the bus and of the bus driver himself. Two of the passengers, Mrs. Page and Mrs. Augusti, testified that the taxicab had never stopped or slowed down (R. 50, 51, 53, 56, 58-59). The third passenger, Mrs. Calder, first saw the taxicab standing still in front of the bus after the sudden stop of the bus, but did not see it prior to that time, and she could not

say how long it had been standing still or what the bus driver had done with reference to the taxicab prior to the sudden stop (R. 61-62). Mrs. Augusti testified that the taxi was a "light colored cab . . . cream colored" (R. 59).

Respondent's driver was an obviously unsatisfactory and unconvincing witness. He said the cab was black and was driven by a colored woman (R. 126). He stated that the cab pulled out suddenly from the curb and on reaching the middle lane stopped suddenly in front of the bus without warning (R. 129-130). But the bus driver admitted that there was nothing to cause the cab to stop because the traffic light was green and there were no vehicles or pedestrians in front of it. (R. 130-131, 133). The bus driver also testified that he saw the cab standing at the curb, but he could not estimate how far behind the taxicab his bus was at that time, even by comparison of distances in the courtroom, nor could he say how far to the rear his bus was when the taxicab started up (R. 129). Even though he watched the taxicab the entire time after it left the curb and pulled in front of him, he did not sound his horn (R. 129). He first said that the taxicab was heading straight east when he applied his brakes (R. 130), and then said that he applied his brakes before it got in front of him when it was pulling out (R. 130). He then testified that he was only 10-12 feet to the rear of the taxicab when he saw it pull out (R. 130), but later indicated that it was 12 feet in front of him before he applied his brakes, because he stopped in 4 feet and the taxicab was 8 feet in front of him after both had stopped (R. 130, 133-136). He didn't know how far the taxicab had travelled from the curb before it stopped in front of him (R. 131, 134); he didn't know how fast the taxicab was going when it pulled out or when it was in front of the bus (R. 133); he didn't know whether the rear stop lights of the taxicab went on, but

he would not deny it (R. 133). He said that at all times his bus was behind the taxicab and the taxicab was never alongside the bus (R. 134, But cf. testimony of Mrs. Page at R. 50-51). He was unable to estimate the taxicab's speed at any time (R. 134). Finally, the bus driver testified (R. 123-124, 126-127, 131) that about the time he cleared the intersection of 6th Street, he first saw the taxicab pulling out from the curb in front of Georgetown Law School (located in the middle of the block) so that he must have had the taxicab under observation for half a city block prior to his sudden stop.

Respondent's motion for a directed verdict at the close of the evidence was overruled, because in the trial court's opinion the self-contradictory and confusing defense testimony attempting to explain the sudden stop was not sufficient as a matter of law to rebut the prima facie case established by respondent (R. 166).

On this record, the court below in a brief opinion held that in view of petitioner's "relative uncertainty" as to whether respondent's driver in fact stopped to avoid a collision with a taxi and the otherwise uncontradicted (although conflicting) explanation of respondent to that effect, respondent's motion for a directed verdict should have been granted (R. 181).

REASONS FOR GRANTING THE WRIT

Edith Maske cannot retain her $20,000 verdict against the bus line, says the United States Court of Appeals, because she cannot affirmatively rebut the evidence offered by the bus line purporting to explain the cause of the accident . The Court of Appeals, would therefore say that the long established doctrine of res ipsa loquitur as applied in numerous common carrier cases by this Court is no protection to injured passengers unless they prepare for the accident by so placing themselves as to ac-

quire sufficient information and evidence to rebut any attempted explanation by the carrier for the accident. Further, the Court of Appeals would say that the inference of negligence created by the res ipsa doctrine is not sufficient to create a jury question if *any* explanation is offered by the carrier unless direct countervailing evidence is offered, and that the plausibility, credibility, consistency, and/or completeness of the carrier's explanation cannot be submitted to a jury. Beyond this, the court below says that notwithstanding the facts that both the jury and the trial court apparently either disbelieved the carrier's explanation or felt it was not a complete, adequate or consistent explanation, the court could on a dead record evaluate that explanation and find it to be a complete bar to the passenger's recovery. This, we submit, is neither law nor justice. It flies in the face of numerous decisions of this Court; it would emasculate the res ipsa loquitur doctrine and make a mockery of the time-honored requirement that common carriers exercise the highest degree of care for their passengers.

Even the closest reading of the Court of Appeals opinion does not permit of certainty as to just what that court finds the law to be. It says the issue of fact involved at trial "was whether the sudden stop was (1) unnecessary and negligent, or (2) necessary to avoid collision with a taxicab that turned suddenly across the path of the bus" (R. 181). After briefly but incompletely reviewing the evidence in this connection, the court concludes that ". . . in view of (petitioner's) relative uncertainty on the witness stand [as to whether a cab did suddenly cut in front of the bus as testified to by the bus driver and some other witnesses], we must conclude the verdict lacks substantial support . . . [and that respondent's] motion for a directed verdict should have been granted" (R. 181).

It would appear that the court below found either (1) that the res ipsa loquitur doctrine was inapplicable here

and that, therefore, the injured passenger had the burden of showing that the accident was avoidable, or (2) that although the doctrine was applicable to establish a prima facie case, the inference of negligence thereby created was automatically wiped out by *any* explanation whatsoever offered by the carrier if not directly rebutted, without regard to whether that explanation was complete, consistent, plausible or credible.

Because the case was tried and submitted to the jury on the res ipsa theory and the court below does not disavow or even mention the applicability of the doctrine in the opinion, it is believed that the latter is the ratio decedendi of the Court of Appeals determination. In either event, however, the determination below is palpably wrong and requires the corrective and guiding hand of this Court because: (1) the decision is in conflict with numerous decisions of this court and lower federal courts, and even with prior decisions of the court below; (2) the decision has utterly confused the law of the District of Columbia, if not the law generally, on the applicability of the res ipsa loquitur doctrine and has obscured any clear standards for trial courts; (3) the result would be to impose a severe handicap on passengers injured in common carrier accidents who are not in a position to explain the accident or rebut purported explanations by the carrier, and would relieve common carriers of their duty to exercise the highest degree of care for their passengers; (4) the decision impairs and substantially limits the right of trial by jury, and (5) contrary to established principles often enunciated by this Court and traditional to our system, the Court of Appeals assumes a capacity to evaluate conflicting evidence on a cold record so as to reach a conclusion contrary to that adopted by a jury and trial judge who had the opportunity to make a face to face appraisal of the credibility and completeness of the evidence offered on the witness stand.

The Res Ipsa Loquitur Doctrine Is Applicable

As previously stated, this case was tried and submitted on the res ipsa theory, and the fact that respondent did not even make the customary motion for a directed verdict at the close of petitioner's opening case almost certainly substantiates the correctness of this submission. On almost parallel facts, the Ninth Circuit held the doctrine applicable to establish a prima facie case. In that case, *Wichita Transportation Corporation* v. *Braly*, 150 F. (2d) 315, 316-317, (C.C.A. 9, 1945), the court stated:

> "We start with the rudimentary principle that while a common carrier is not an insurer of the safety of its passenger, it is held to a high degree of care, commensurate with the particular hazards involved. *Picou* v. *Kansas City Public Service Co.*, 134 P. (2d) 685; *McQuin* v. *Santa Fe Trail Transportation Co.*, 122 P. (2d) 787; *Miller* v. *Kansas City Public Service Co.*, 15 P. (2d) 453; *Oppenheim* v. *Toye Bros. Yellow Cab Co.*, 7 So. (2d) 420. Making application of this standard of care, it is said that a passenger assumes the natural consequences of normal jerks as a part of the ride in a public conveyance, but a 'sharp, unusual and violent' stop is evidence from which a legitimate inference of negligence may be inferred. *McQuin* v. *Santa Fe Trail Transportation Co., supra; Dempsy* v. *Market Street Ry. Co.*, 142 P. (2d) 929; *Waite* v. *Pacific Gas & Electric Co.*, 132 P. (2d) 311; *McIntosh* v. *Los Angeles Ry. Corp.* 59 P. (2d) 959. See also Mark Shaines' *Res Ipsa Loquitur*, Presumptions and Burdens of Proof, p. 457.
>
> ". . . it is a generally understood and accepted rule in cases of this kind, that the fact of the unusual and violent stop is factually sufficient within itself to establish a *prima facie* case in favor of the passenger who is injured by reason thereof, and to cast upon the appellant the duty of showing that such stop was caused by circumstances beyond the control of the driver while exercising the highest degree of care and caution. *McQuin* v. *Santa Fe Trail Transportation Co., supra; McIntosh* v. *Los Angeles Ry. Corp.*

supra; Jackson v. *Capital Transit Co.*, 38 A. (2d) 108.

"Thus, the appellee established a *prima facie* case by showing that she was a passenger on the bus and that she was injured by a sudden and violent stoppage of it. The appellant sought to be relieved of liability for the injury by showing that the bus moved into the intersection traveling approximately three miles per hour in low gear, and that when the driver of the automobile, while moving directly in front of the bus suddenly stopped to avoid hitting a pedestrian, the bus driver exercised proper care in bringing his bus to as smooth a stop as possible to keep from hitting the car.

"The bus driver, however, does not acquit himself of the presumption of negligence arising out of the usual and sudden stop by showing that he exercised proper care in bringing the bus to as smooth a stop as possible to keep from hitting the car. The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it. *Oppenheim* v. *Toye Bros. Yellow Cab Co., supra.* Cf. *Tochek* v. *Monongahela Transport Co.*, 152 S.E. 776. Having been faced with the necessity of stopping the bus in a manner to cause injuries to the passengers, it became the duty of the appellant to show to the satisfaction of the jury that it did not negligently create or contribute to the creation of the emergency which necessitated the 'sharp, unusual and violent' stop.

"Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that if the driver of the bus had kept a reasonable lookout he would have anticipated the act of the driver of the automobile and thereby avoided the necessity of the sudden stop which caused the injuries to appellee.

See also: *Matsumoto* v. *Chicago & N.W. Ry. Co.* 168 F. (2d) 496 (C.C.A. 7, 1948); *Murray* v. *Rio Grande*

Motorway, 171 F. (2d) 82 (C.C.A. 10, 1948); *United States* v. *DeBack*, 29 F. Supp. 141, affirmed in 118 F. (2d) 208 (C.C.A. 9, 1941); *Tilton* v. *Phila. Rapid Transit Co.*, 231 Pa. 63; 79 A. 877 (1911).

And this Court has, from its earliest days, repeatedly held that an accident to a passenger is prima facie evidence of negligence on the part of the carrier, and the passenger being himself in the exercise of due care, the burden then rests upon the carrier to show that its whole duty was performed and that the injury was unavoidable by human foresight. See, e.g. *Gleeson* v. *Virginia Midland R. Co.*, 140 U.S. 435, 35 L. ed 458 (1891); *New Jersey R. & Transp. Co.* v. *Pollard*, 22 Wall, 341, 22 L. ed 877 (1875); *Stokes* v. *Saltonstall* 13 Pet. 181, 10 L. ed. 115 (1839).

As a matter of fact, this rule has previously been enunciated and followed by the court below in *Capital Transit Co.* v. *Jackson*, 80 U.S. App. D.C. 162, 165, 149 F. (2d) 839, 840 (1945) where the court stated:

> "Here appellee was a passenger on one of the cars of Transit Company and that fact imposed on the Company the exercise of a very high degree of care to transport her in safety to her destination. The management and control of the transportation were confided to the employee operating the car. Appellee was not expected or required to be on watch against accidents or collisions with other vehicles. *Accordingly, when, as in this case, a collision occurred, that circumstance alone was sufficient to permit the jury to infer that the carrier had been negligent.*" [Emphasis supplied.)

In the *Jackson* case, the court below held that an inference of negligence for jury consideration was created by the fact of an accident and that the injured passenger "was not expected or required to be on watch against accidents or collisions with other vehicles". Yet in the instant case that court would deprive petitioner of her jury verdict and prevent jury consideration of

the facts because she was not on watch and could not directly rebut the carrier's purported explanation. It is in the resulting welter of confusion that the District of Columbia bench and bar will have to adjudicate common carrier injury cases if this Court does not intervene on writ of certiorari to clarify the law.

In Common Carrier Cases A Directed Verdict Cannot Be Granted Where Res Ipsa Loquitur Applies

Boiled down, the posture of this case at the close of the evidence was that petitioner had proven and respondent admitted that the bus had come to a sharp and unexpected stop resulting in petitioner's injury, that respondent had attempted to explain by asserting that the bus driver was compelled to stop to avoid collision with a taxicab that darted out into his path and that petitioner, while stating she did not see the cab, could not directly state it was not there.

Both on the facts and as a matter of law, this presented a jury question precluding a motion for directed verdict. Looking at the facts alone, for a moment, the court below assumed that the respondent's explanation was conclusive. But that is absurd. Even assuming that the explanation was complete, there remained the critical problem of credibility and the jury might well have chosen to disbelieve part or all of the allegedly explanatory testimony. Indeed, it is difficult to imagine how the jury could have concluded that the confused and self-contradictory testimony of the bus driver constituted any reliable "explanation" for his sudden stop.

More important, however, what apparently escaped the court below was the factual problem whether the explanation offered by the bus company completely answered and rebutted the inference of negligence. In the trial court, petitioner contended and still contends that the bus driver's own testimony established his negligence, much less rebutting the inference available from the res

ipsa rule. Even were we to assume the jury believed and understood respondent's witnesses, the jury could, and probably did, conclude that there was no adequate explanation as to how the bus driver permitted himself to get into such a position with the cab that he was then compelled to stop suddenly to avoid a collision. On the evidence it could have been concluded that the bus driver should have slowed sooner when he first saw the cab leave the curb or should have given a warning signal or should have turned his bus out into the empty east bound lane or taken other steps to avoid an abrupt stop that might, and in fact did, injure passengers. In short, even assuming the credibility of respondent's evidence,

> "The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it . . . Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that *if the driver of the bus had kept a reasonable lookout he should have anticipated the act of the driver of the automobile and, therefore avoided the necessity of the sudden stop* which caused the injuries to appellee". (Italics supplied.)

Wichita Transportation Corporation v. *Braly, supra,* 150 F. (2d) at 137.[1]

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[1] In *Bell Cab Company, Inc.* v. *Coppridge,* 81 U.S. App. D.C. 337, 338, 158 F. (2d) 540, 541 (1946), where a cab company was held liable to a passenger notwithstanding that a private automobile which collided with the cab had clearly violated a traffic regulation, the court below said:

> "The jury had a right to conclude, as it did, that the extraordinary care due from a taxicab driver required either that he stop, or that he be prepared to stop almost instantly should the other car fail to observe the stop sign and so fail to yield the right-of-way".

The facts here—the problem as to credibility and/or adequacy of explanation offered by the carrier—demonstrate the reason for the established law that proper application of the res ipsa doctrine creates an inference of negligence and a prima facie case for jury consideration precluding a motion for directed verdict. All of the decisions cited earlier on the doctrine support the established rule that where res ipsa applies, the plaintiff has a prima facie case for jury consideration. That case is no less meritorious because defense testimony purports to explain away the accident unless it is to be assumed that the truth or adequacy of explanation cannot be evaluated in the absence of direct contradiction. The error of such an assumption is plain from this Court's treatment of the res ipsa question.

The scope of that rule is best defined in the classic decision in *Sweeney* v. *Erving*, 228 U. S. 233, 57 L. ed. 815 (1913), recently here referred to as a "decision which cut through the mass of verbiage built up around the doctrine of res ipsa loquitur". *Jesionowski* v. *Boston & M. R. Co.*, 329 U. S. 452, 457, 91 L. ed. 416, 420 (1947). In the *Sweeney* case this Court, reviewing the history of the rule, stated that (228 U. S. at 240, 57 L. ed. at 819):

> "In our opinion, res ipsa loquitour means that the facts of the occurrence warrant the inference of negligence, not that they compel such an inference; that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking, but it is evidence to be weighed, not necessarily to be accepted as sufficient; that they call for explanation or rebuttal, not necessarily that they require it;

> *that they make a case to be decided by the jury,* not that they forestall the verdict. Res ipsa loquitur, where it applies, does not convert the defendant's general issue into an affirmative defense. *When all the evidence is in, the question for the jury is whether the preponderance is with the plaintiff.*" [Emphasis supplied.]

This Court then went on in the *Sweeney* case to quote with approval from a state decision to the following effect (228 U. S. at 241, 57 L. ed. at 819):

> "In the case at bar the plaintiff made out her cause of action prima facie by the aid of a legal presumption [referring to res ipsa loquitur], . . . If the defendant's proof operated to rebut the presumption upon which the plaintiff relied, or if it left the essential fact of negligence in doubt and uncertainty, the party who made that allegation should suffer, and not her adversary. *The jury were bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relied, and, in determining the weight to be given to the former as against the latter,* they were bound to apply the rule that the burden of proof was upon the plaintiff. If, on the whole, the scale did not preponderate in favor of the presumption, and against defendant's proof, the plaintiff had not made out her case, since she had failed to meet and overcome the burden of proof." [Emphasis supplied.]

In this connection, it is interesting to note that in the case of *Johnson* v. *United States,* 333 U. S. 46, 92 L. ed. 468 (1947), where this Court reversed a Court of Appeals judgment thus reinstating a District Court judgment rendered on a res ipsa theory, Mr. Justice Frankfurter, even though disagreeing with the majority's application of the rule, there concluded he would have sent the case back for a new trial.

Thus, proper application of the res ipsa rule gives rise to an inference of negligence which the plaintiff is entitled to have the jury evaluate along with all other

circumstances and evidence in the case. And that opportunity cannot be foreclosed because a purported explanation by the carrier is not directly rebutted. "A conceptualistic interpretation of res ipsa loquitur has never been used by this Court to reduce the jury's power to draw inferences from facts. Such an interpretation unduly narrows the doctrine as this Court has applied it". *Jesionowski* v. *B. & M. R. Co.*, 329 U.S. 452, 457, 91 L ed. 416, 420 (1946).

The Court of Appeals Usurped the Jury's Function of Weighing Conflicting Evidence

It is axiomatic that on appeal a motion for directed verdict raises only a question whether there was some substantial evidence to support the verdict and does not permit of an appellate evaluation of conflicting evidence. Oblivious to this nicety of appellate procedure, the court below chose first to ignore the effect of the res ipsa doctrine creating an inference of negligence and thereby a prima facie case, and second, to predicate its direction that a judgment be entered for respondent on the ground that its explanatory testimony was not rebutted or overcome by the "relative uncertainty" of petitioner's testimony bearing on the defense.

We submit that it was a plain abuse of appellate jurisdiction for the court below to have presumed to evaluate either the truth or weight to be accorded petitioner's testimony as against that of respondent. The jury obviously thought differently about the testimony, and the trial judge who had the opportunity to observe the witnesses did not feel he could say the jury were unreasonable. Yet on the cold record, the Court of Appeals can omnisciently say that one body of testimony or evidence is more impressive than another.[2]

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[2] As a practical matter, that conclusion was reached only by torturing the record. For example, the court, while not speaking

We know of no similar case, but, on the contrary, are familiar with repeated declarations of this Court and other appellate courts criticizing the practice of invading the jury's function in cases where much less than "uncertainty" on the part of a witness was accepted by the jury. In *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. ed. 916, 923 (1946) this Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fair-minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion.

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of the bus driver as a disinterested witness, mentions that he is no longer with the bus company as if his credibility is thereby enhanced (R. 181). But the jury might nevertheless have chosen to disbelieve him because of his interest in maintaining a clean accident record or because of lack of forthrightness on the stand which is somewhat evident in the record of his testimony. The court also speaks of petitioner's "relative uncertainty", but she stated plainly she saw no cab in front of the bus before the sudden stop and whether that testimony was delivered "uncertainly" or convincingly would seem to be a matter that a jury could better determine in the courtroom than an appellate judge reviewing the printed record in his study. Finally, the court refers to "her previous contradictory statement to her doctor that the bus and auto almost had a collision" as inferentially a basis for concluding petitioner should not have been believed by the jury. What the court below apparently chose to ignore was (1) that the quoted prior contradictory statement was contained on the doctor's records but that the doctor was dead and not available for trial to be examined as to the accuracy of the quotation or the circumstances under which it was recorded, and (2) that even assuming petitioner made the quoted statement to her doctor it could have been acquired hearsay from other passengers or sources developed after the accident (R. 188).

"And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

And in *Corinne Mill, Canal & Stock Company* v. *Alexander Toponce*, 152 U. S. 405, 38 L. ed. 493, 494 (1894), the Court said:

"It is unnecessary to refer to the testimony which tends to weaken the scope of these general statements of the plaintiff and the foreman, because such conflict presents but a mere question of fact, upon which the verdict of the jury is conclusive.

"It is unnecessary to consider the contradictory testimony or attempt to determine the actual facts in reference to this matter. It is enough that the jury by their verdict have practically affirmed the truth of plaintiff's story.

". . . While the evidence to sustain this verdict is not entirely satisfactory, and while, if submitted to this Court originally on the printed testimony, a different conclusion might possibly be reached, yet, the jury having found for the plaintiff on part of his claim and the judge who heard the case in the court below having refused to set the verdict aside, we do not think it is so far unsupported by the evidence as to justify this court in doing so.

And in *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. ed. 520, 525 (1944), the Court stated:

"It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to

> select from among conflicting inferences and conclusions that which it considers most reasonable . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

See also *Myers* v. *Pittsburgh Coal Co.*, 233 U. S. 184, 58 L. ed. 906, 911 (1914); *Haupt* v. *United States*, 330 U. S. 630, 91 L. ed. 1145, 1153 (1947); *Chicago & N. W. R. Co.* v. *Ohle*, 117 U. S. 123, 29 L. ed. 837, 839 (1886).

Remembering that a vital facet of our common law system is the inherited colonial aversion to judicial invasion of the jury box, it is respectfully suggested that this Court should exercise its jurisdiction to correct the action below.

CONCLUSION

The decision below not only is in direct conflict with numerous decisions of this Court and lesser federal courts, but if left to stand will bring utter confusion into the law of the District of Columbia and federal law generally in respect to application of the res ipsa loquitur doctrine. Moreover, it introduces a concept of the scope of appellate review foreign to our common law system and destructive of the jury system. The decision is plainly erroneous and, accordingly, this petition for a writ of certiorari should be granted.

Respectfully submitted

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August, 1951

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 266.

EDITH O. MASKE, *Petitioner,*

v.

WASHINGTON, MARLBORO & ANNAPOLIS MOTOR LINES, INC.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinion Below.

The District Court wrote no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (R. 181-182) is not yet reported.

Jurisdiction.

The jurisdictional requisites are adequately set forth in the Petition.

Question Presented.

Whether there was sufficient evidence of negligence to go to the jury in a non *res ipsa loquitur* personal injury action where plaintiff's version was uncorroborated and her credibility impeached in many material particulars.

Statement.

Petitioner filed an amended complaint whereby she sought damages for personal injuries upon the claim that a fellow bus passenger was forced against the seated petitioner by excessive speed and sudden stopping of respondent's bus (R. 2-3).[1] At pre-trial no mention was made of speed nor of a *res ipsa loquitur* claim, reliance being placed upon the specific negligence claim of a sudden stop (R. 5-6). The jury verdict for petitioner (R. 6) was reversed by the Court of Appeals upon the ground that as the verdict lacked substantial support respondent's motion for a directed verdict should have been granted (R. 182).

The accident occurred July 9, 1947 (R. 15). Sole evidence offered on behalf of petitioner as to the alleged negligence was her own testimony (R. 11). She testified that: the bus was going 30 to 35 miles per hour (R. 17, 19), crossed 5th Street and came to a violent stop (R. 17) with its front end in the cross-walk (R. 18); a standing passenger was thrown forward by the stop and stepped on top of petitioner's foot (R. 17, 31); the stop was for no apparent reason (R. 18), and although petitioner was looking ahead of the bus in the direction it was traveling before, and at the time of, the sudden stop there was no car in front of the bus (R. 34); petitioner was treated the date of the accident by Dr. E. W. Schwartze, deceased (R. 20, 21, 39), and had signed a blank piece of paper for him (R. 35), but she had never told him nor anyone that the cause of

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[1] Petitioner's amended complaint charged the fellow-passenger with negligence in failing to secure a proper grip upon the bars provided for the safety of standing and seated passengers. Before trial petitioner dismissed her action as to the fellow-passenger (R. 5).

the sudden stop was a near collision with a car (R. 35, 43).

All witnesses except petitioner, including the bus driver and three disinterested passengers, testified to the effect that the speed was reasonable (R. 124, 49, 56, 62). All saw a taxicab in front of the bus (R. 124, 62, 56, 48). The place of the stop was uniformly placed at a point other than the intersection of 5th and E Streets (R. 125, 127, 61, 55, 48). The evidence was that the emergency arose "very suddenly" and prompt safety measures were taken (R. 51, 124).

Petitioner's uncorroborated testimony was further demonstrated to have been false relative to her claims: of first having been treated for her alleged injuries on the date of the accident rather than nine days later (R. 20, 21, 39; R. 109); of never having had arthritis in the right foot prior to the accident (R. 43, 44; R. 152); of never having seen the investigator who had secured her signed statement (R. 35, 43; R. 68); of not only not having written the word "supervisor" on the Medical Report signed by Dr. E. W. Schwartze but of never having seen the paper, Exhibit "E" (R. 41-42; R. 91, 98, 179). Despite her denials, it was "proved beyond reasonable doubt" that petitioner had told her doctor the "bus and an auto almost had a collision" (R. 179, 182).

Argument.

The issue in the instant case is the familiar one of whether a verdict lacked substantial support in the evidence, and no amount of disappointment upon petitioner's part can convert the case into one warranting review by this Court on certiorari.

In the first place, the decision of the Court of Appeals was clearly right because petitioner's uncorroborated trial version of the accident, considered with all the disinterested testimony and her own prior contrary statement to her doctor, amounted at most to a "mere scintilla" of evi-

dence, which did not entitle her to go to the jury.[2] In the second place, petitioner's contention that because this was a common carrier case it was a *res ipsa loquitur* case and therefore had to go to the jury is erroneous.[3] A passenger may proceed upon a *res ipsa loquitur* theory, but need not do so, and indeed should not do so where the facts are admittedly available.[4] Petitioner neither pleaded, relied on at pretrial, nor sought to amend at the trial to claim reliance on *res ipsa loquitur*. Finally, even if the Court of Appeals for the District of Columbia Circuit decision were considered erroneous or unwise, that court has long been accorded, as a matter of policy by this Court, the right and duty to declare the local law of the District of Columbia as if it were the highest court of a state.[5]

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[2] *Pennsylvania R. R.* v. *Chamberlain*, 288 U. S. 333 (1933); *Jackson* v. *Capital Transit Co.*, 69 App. D. C. 147, 99 F. 2d 380 (1938).

[3] Mere relationship of carrier and passenger neither automatically brings into play the doctrine, nor forecloses a favorable result to the defendant at the direction of the court. *Brown* v. *Capital Transit Co.*, 75 U. S. App. D. C. 337, 127 F. 2d 329 (1942) (directed verdict where passenger fell); *Connor* v. *Washington Ry. & Elec. Co.*, 43 App. D. C. 329 (1915) (demurrer sustained to allegation of "sudden start"). *Capital Transit Co.* v. *Jackson*, 80 U. S. App. D. C. 162, 149 F. 2d 839 (1945), relied upon by petitioner (Petition, p. 12), is not a holding to the contrary since there the defendant-carrier put on no proof.

[4] *Res ipsa loquitur* is a "rule of necessity to be invoked only when necessary evidence is absent and not readily available." See 3 COOLEY, TORTS (4th ed. 1935) § 480. A recent statistical study indicates that in airline accidents, plaintiffs relying upon *res ipsa loquitur* prevailed in only one of eleven cases. McLarty, *Res Ipsa Loquitur in Airline Passenger Litigation* (1951) 37 VA. L. REV. 55, 60.

[5] *Griffin* v. *United States*, 336 U. S. 704, 717 (1949); and see list of cases in which certiorari has been denied, appendix to opinion, p. 719. The fact that for the District of Columbia, its Court of Appeals adopted a rule of law unique throughout the United States did not move this Court to grant certiorari in *Argonne Co., Inc.* v. *Hitaffer*, 340 U. S. 852 (1950).

Conclusion.

The decision below is correct in requiring substantial support in the evidence for a verdict, and represents a matter of purely local law for the District of Columbia. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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HOGAN & HARTSON,
Of Counsel.
August, 1951.

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In The

Supreme Court of the United States

October Term, 1951

No. 266

Edith O. Maske,

Petitioner,

v.

Washington, Marlboro & Annapolis Motor Lines, Inc.
(Also known as W. M. & A. Motor Lines Inc.)
a body corporate

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

TO THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Edith O. Maske, by her attorney, Dorsey K. Offutt, respectfully petitions this Court for a rehearing of the order made on October 8, 1951 denying the petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its judgment in this case.

STATEMENT

On August 21, 1951 there was filed in this Court a petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review its decision in this cause.

The following five questions were presented by the petitioner:

1. Whether applicability of the *res ipsa loquitur* doctrine in a common carrier case permits the entry of a directed verdict against a passenger.

2. Whether the inference of negligence permitted by the *res ipsa* doctrine can be vitiated by the carrier's explanation for the accident without regard to whether that explanation is believed or accepted by the jury or trial court.

3. Whether a directed verdict can be ordered by an appellate court where plaintiff admittedly established a prima facie case and where there is conflicting evidence.

4. Whether a common carrier passenger properly relying on the *res ipsa* doctrine is foreclosed from recovery or a jury's evaluation of the carrier's proffered explanation of the accident, because the passenger does not have affirmative independent evidence to rebut the alleged explanation.

5. Whether petitioner has been denied her right of trial by jury because her credibility was doubted by the Circuit Court of Appeals, although not by the jury or the trial court.

On October 8, 1951, this Court made an order denying the petition. Mr. Justice Black declared he was in favor of granting the petition.

On October 19, 1951, the Honorable, the Chief Justice, extended the time for filing a petition for rehearing to and including November 10, 1951.

This petition for rehearing is made pursuant to Rule 33 of the Rules of this Court, as amended.

The grounds on which this petition is made is that there are substantial grounds available to petitioner for the granting of the petition which were not previously presented.

REASONS FOR GRANTING THE PETITION FOR REHEARING AND PETITION FOR A WRIT OF CERTIORARI

1. Petitioner has been denied a jury trial in contravention of the Seventh Amendment to the Constitution of the United States.

2. Petitioner has been denied her right to a jury trial under the Seventh Amendment to the Constitution of the United States.

3. The Circuit Court of Appeals was without Constitutional right under the circumstances of this case to reverse the judgment of the trial court without granting a new trial.

4. Rule 50(b) of the Federal Rules of Civil Procedure contravenes the Seventh Amendment to the Constitution of the United States insofar as it permits an appellate court to weigh substantial evidence and resolve conflicting evidence and inferences therefrom, as was done by the Circuit Court of Appeals.

1, 2. The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Circuit Court of Appeals after the case was submitted to a jury and a verdict was returned by it in favor of petitioner and although judgment n.o.v. and motion for new trial were each overruled by the trial court who heard the evidence and observed the witnesses, re-examined and re-evaluated the testimony, weighed conflicting evidence as well as the permissible inferences which might have been drawn therefrom, and overturned the verdict of the jury ordering a final judgment for the respondent. The Appellate Court in so doing not only deprived petitioner of a jury trial but also of her right to a jury trial, for the jury's verdict was set aside and petitioner may never have her case heard by a jury. In both respects the action of the Circuit Court of Appeals below was in violation of the petitioner's right under the Seventh Amendment.

The decision and judgment of the Circuit Court of Appeals in the instant case is of far-reaching importance and effect, and represents a landslide in the process of judicial erosion of the essential guarantee under the Seventh Amendment. The impact of this decision will be incalculable on courts—both trial and reviewing—in encouraging and sanctioning the weighing and re-evaluating of conflicting evidence, gradually absorbing the jury's function, substituting their opinion on the evidence for that of the jury, and progressively depriving litigants of jury trials.

In recent years numerous decisions of this Court have been rendered respecting the guarantees of the First, Fourth, Fifth and Sixth Amendments, safeguarding those

provisions of the Bill of Rights which were found to have been abridged or denied. There have also been many cases under the Federal Employers' Liability Act (a quasi-specialized action analagous in some respects to the kind of case here presented) in which the Constitutional function of the jury was obliquely involved in the course of the interpretation of the Act.

This Court has not hesitated to restrain executive and legislative action, State or Federal, which has contravened the historic safeguards found in the Bill of Rights and as construed to be embodied in the Fourteenth Amendment. But when the vast number of civil jury trials affecting the rights to secure the lives and property of our citizens and inhabitants is envisaged, it is at once realized there is no Amendment more important to the litigant, citizen or alien, and to the welfare of the people or more precious for them, safeguarding them from arbitrary action, than the right of jury trial guaranteed by the Seventh.

Rather diffidently it is suggested that the Constitutional right preserved by the Seventh Amendment is one which calls for restraint upon the courts by themselves. More especially, therefore, should this Court be zealous in restraining an Appellate Court from in any way depriving or interfering with a jury trial or a right to it, under that Amendment. It is unthinkable that any less regard be had for an invasion of Constitutional right by judicial tribunal than by unconstitutional action of any other authority or that such invasion be harmless if done by the courts themselves. The courts, as guardians of those rights, should themselves set the example of strict observance of Constitutional guarantees to the citizen and Constitutional limitations upon judicial authority, in order that it may not be said in any quarter that the courts have any less heed for judicial encroachment upon Constitutional guarantees than from any other source.

As this Court said in *Jacobs* v. *New York*, 315 US 752, 86 L ed 1166, 62 S.Ct. 854:

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

In *Ellis* v. *Union Pacific Railroad Co.*, 329 U.S. 649, 91 L. ed. 572, 67 S. Ct. 598 this Court reversed the judgment of an appellate court setting aside alleged asserted insufficiency of evidence to support the verdict of a jury stating:

> "The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted facts, are questions for the jury. Tennant v. Peoria & P.U.R. Co. 321 US 29, 88 L Ed 520, 64 S. Ct. 409, 15 NCCA (NS) 647; Lavender v. Kurn, 327 US 645, 90 L ed 916, 66 S Ct 740, supra. Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable. Lavender v. Kurn, supra (327 US p 652, 90 L ed 922, 66 S Ct 740). And where, as here, the case turns on controverted facts and the credibility of witnesses the case is peculiarly one for the jury. Washington & G.R. Co. v. McDade, 135 US 554, 572, 34 L ed 235, 241, 10 S Ct 1044; Tiller v. Atlantic Coast Line R. Co. 318 US 54, 68, 87 L. ed 610, 618, 63 S Ct 444, 143 ALR 967."

And in *Wilkerson* v. *McCarthy*, 336 US 53, 93 L ed 497, 69 S. Ct. 413, it was said:

"The opinion of the Utah Supreme Court strongly indicated, as the dissenting judge pointed out, that its finding of an absence of negligence on the part of the railroad rested on that court's independent resolution of conflicting testimony. This court has previously held in many cases that where jury trials are required, courts must submit the issues of negligence to a jury if evidence might justify a finding either way on those issues. See, e.g. Lavender v. Kurn, 327 US 645, 652, 653, 90 L ed 916, 922, 66 S Ct 740; Bailey v. Central Vermont R. Co. 319 US 350, 354, 87 L ed 1444, 1447, 63 S. Ct. 1062; Tiller v. Atlantic Coastline R. Co., 318 US 54, 68, 87 L ed 610, 618, 63 S Ct 444, 143 ALR 967; see Brady v. Southern R. Co. 320 US 476, 88 L Ed 239, 242, 64 S Ct 232. It was because of the importance of preserving for litigants in FELA cases their right to a jury trial that we granted certiorari in this case."

Moreover, in *Tennant* v. *Peoria & Pekin Union Railroad Co.*, 321 US 29, 88 L ed 520, 64 S. Ct. 409 it was said:

"Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked. Galloway v. United States, 319 US 372, 395, 87 L ed 1458, 1473, 63 S Ct 1077; Atchison, T. & S.F.R.Co. v. Toops, 281 US 351, 74 L ed 896, 50 S Ct 281. If that requirement is met, as we believe it was in this case, the issues may properly be presented to the jury. No court is then justified in substituting its conclusions for those of the twelve jurors."

In *Lavender* v. *Kurn*, 327 US 645, 90 L ed 916, 66 S. Ct. 740, it was said:

"But such evidence has become irrelevant upon appeal, there being a reasonable basis in the record for inferring that the hook struck Haney. The jury having made that inference, the respondents were not free to litigate the factual dispute in a reviewing court. Under

these circumstances, it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the credibility of witnesses and arrive at a conclusion opposite from the one reached by the jury."

In a petition of this nature, it seems neither feasible nor appropriate to make a detailed analysis of the evidence, but beyond a shadow of a doubt there was a sufficient case made for the jury.[1] It is believed no one

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[1] Without unnecessarily duplicating matters already in the record, suffice it to say, R. 184, 193, and Petition for Writ of Certiorari (Pages 10 to 17) conclusively demonstrate this. Moreover, in *Chicago & Northwestern Ry. Co.* v. *Green*, 8 Cir., 164 F. 2d 55-60, in holding the scope of jury inference in the quasi-analogous cases under FELA must be liberally and not narrowly or stultifyingly viewed, it was said:

> "And traditionally, even more plenary than in cases requiring proof of specific negligence is the scope of inference which has been recognized as being open to a jury in situations of res ipsa loquitur.
>
> "Thus, it was said in the somewhat early case of Gleeson v. Virginia Midland Railroad Co., 140 US 435, 444, 11 S.Ct. 859, 862, 35 L. ed. 458: 'When [the plaintiff] proves the occurrence of the accident, the defendant must answer that case from all the circumstances of exculpation, whether disclosed by the one party or the other. * * * And it is for the jury to say, in the light of all the testimony, and under the instructions of the court, whether the relation of cause and effect did exist, as claimed by the defense, between the accident and the alleged exonerating circumstances.'
>
> "[3] Only where the defendant's evidence of explanation and exculpation is so legally absolute that no possible hypothesis of proximate negligence can reasonably survive it on the facts and circumstances of the accident is a court entitled to direct a verdict in a res ipsa loquitur case. Cf. Myers v. Pittsburgh Coal Co., 233 US 184, 193, 34 S.Ct. 559, 58 L.Ed. 906."

Such situations will be "of the rarest exceptions." The jury in the instant case on the whole record evidently thought, as they had a right to believe, the defendant's explanation of the sudden, violent jerk which admittedly occurred and threw passengers forward, was insufficient to show that the alleged emergency which it was contended required the bus driver to stop suddenly was not one created

can read the record in this case and the opinion of the Circuit Court of Appeals without coming to the inescapable conclusion that the Appellate Court took upon itself the function of an appellate jury, resolving matters of credibility of witnesses, re-evaluating the evidence and drawing its own inferences, narrower than the scope of permissible inferences open to the jury. A casual reading of the short opinion dealing only with factual matters will reveal that the Appellate Court plainly substituted its view of the evidence for that of the jury, which is precisely the purpose of the Seventh Amendment to avoid and prevent.[2]

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by his own negligence in whole or in part. See *Wichita Transportation Corporation* v. *Braly*, 10 Cir., 150 F. 2d 315:

> "The crucial question here is not what he did after he was faced with the emergency—it is how he happened to become involved in it. . . . Whether the 'emergency' which required the sudden stop was created by the failure of the bus driver to keep a reasonable lookout and anticipate the acts of the driver of the automobile is not in our view in these circumstances a question of law but one of fact. The question was clearly and simply submitted to the jury upon this theory and by its verdict the jury said in substance that if the driver of the bus had kept a reasonable lookout he should have anticipated the act of the driver of the automobile and, therefore avoided the necessity of the sudden stop which caused the injuries to appellee."

See also *Bell Cab Company, Inc.* v. *Coppridge*, 81 US App. D.C. 337, 158 F. 2d 540.

The jury were likewise warranted in this record in finding the respondent's bus driver's acts of omission or commission constituted a "contributing proximate cause" of the sudden stop. *Carter* v. *Atlantic & St. Andrews Bay Railway Co.*, 338 US 430, 435, 70 S.Ct. 226, 94 L.Ed. 236; *Wetherbee* v. *Elgin, Joliet & Eastern Ry. Co.*, 7 Cir., 191 F. 2d 302.

[2] The opinion baldly states (R. 181): "The chief question of fact at the trial was whether the sudden stop was (1) unnecessary and negligent or (2) necessary to avoid collision with a taxicab that turned suddenly across the path of the bus." The court then proceeds to make a jury determination of such question of fact, supporting much of its conclusion upon a slight portion of the record

It must be remembered the respondent, defendant in the trial court, recognized at the time that a *prima facie* case had been made by petitioner and did not even go through the formality of moving for a directed verdict.

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of cross-examination of petitioner, actually without probative force. The questions on cross-examination quoted in the court's opinion are without evidentiary value because the factual matters were contained in the questions of the cross-examiner. In short, the cross-examiner was trying to place before the jury a version through the medium of a question to which the answer gave no force whatever. For example, the first question could have been patented so as to read: "Mrs. Maske, did you see this car suddenly and without warning pull out immediately in front of the bus an instant before the bus driver put on his brakes to stop the bus instantly in order to keep from having a collision?" A. "No, sir." Now, to this type of question and answer, the Appellate Court attached decisive probative force. Really, the first question quoted in the opinion below indicated that the bus had already stopped before the car pulled out.

The other questions calling for what petitioner who sat on a side seat behind the driver, not facing in the direction of the bus driver, in a crowded bus, did not see are without probative effect.

The suggestion that "It was proved beyond reasonable doubt, although appellee denied, that she had told her doctor the 'bus and an auto almost had a collision,'" seems untenable (R. 189) but even this was a jury question as to whether she was impeached or contradicted on this and *a fortiori* as to the rest of the case.

As to the statement in the opinion (R. 182) "Though it may be more likely that one interested witness will overlook and forget something than that several disinterested witnesses will all imagine something, the jury in a particular case may not be unreasonable in believing the one and disbelieving the others," suffice it to say the relative weight of testimony is for the jury, and the so-called disinterested witnesses were themselves uncertain or contradictory and one was "daydreaming" until after the sudden stop (R. 61).

Finally, the crux of the court's decision appears in the sentence "but in view of appellee's relative uncertainty on the witness stand, and particularly in view of her previous contradictory statement to her doctor, we must conclude the verdict lacks substantial support." If this conclusion is not precisely what the jury itself Constitutionally is to arrive at, it is difficult to perceive what else its function would be. There was no uncertainty as to what petitioner testified to or any uncertainty in her testimony, where the question called for her personal knowledge.

at the close of petitioner's case in chief (R. 47, 185). Plainly, therefore, respondent conceded a case was made for the jury by petitioner and this, of course, included cross-examination of her, upon which so much stress as to a small part thereof, was made by the Circuit Court of Appeals in its opinion (R. 181, 182). Motion by the defendant-respondent in the trial court for directed verdict at the close of all the evidence was promptly denied (R. 166) and no reservation of the motion was then made by the court for later consideration.

The jury returned a verdict for petitioner in the amount of $20,000. The trial court denied respondent's motion for judgment n.o.v. and also motion for a new trial. The order of denial of those motions (R. 9) significantly stated:

> "• • • and it appearing to the satisfaction of the Court from all the evidence and testimony adduced at the trial in open court, and from the oral argument on this motion, that the verdict and judgment should stand • • •."

At no time, therefore, did the trial court who saw the witnesses, observed their demeanor, and heard their testimony, have any doubt that the plaintiff had made a case. Twelve jurors, likewise, viewed the evidence in petitioner's favor. How, then, could the Circuit Court of Appeals conclude that the verdict lacked substantial support or that plaintiff had been contradicted beyond a reasonable doubt, without unconstitutionally itself acting as a reviewing jury.[3]

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[3] *Tiller* v. *Atlantic Coast Line Railroad Co.*, 318 US 54, 87 L ed 610, 63 S. Ct. 444, 143 ALR 967:

> "Many years ago this Court said of the problems of negligence, 'We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others.' Jones v. Tennessee, V. & G. R. Co. 128 US 443, 445, 32 L ed 478, 479. Or as we have put it on an-

Since twelve jurors and the trial court drew conclusions favorable to the plaintiff, how could the Appellate Court in effect hold that fair-minded men would not reach different conclusions, which would make the jury's verdict stand.[4]

Rule 52 of the Federal Rules of Civil Procedure in dealing with actions tried upon the facts without a jury provides that "findings of fact shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." A jury verdict approved by the trial court is at least entitled to the same respect. They saw and heard the witnesses and had the "feel of the case which no appellate printed transcript can impart." *Cone* v. *West Virginia Pulp & Paper Co.*, 330 US 212, 91 L. ed 849, 67 S. Ct. 752.

The Circuit Court of Appeals by its decision and judgment has plainly deprived petitioner of her Constitu-

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other occasion, 'Where the facts are in dispute, and the evidence in relation to them is that from which fair-minded men may draw different inferences,' the case should go to the jury."

Cf. *Bailey* v. *Central Vermont Railroad Co.*, 319 US 350, 87 L ed 444, 63 S. Ct. 444, 143 ALR 967:

"The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue * * * to withdraw such a question from the jury is to usurp its function. The right to trial by jury is 'a basic and fundamental feature of our system of federal jurisprudence'. Jacob v. New York, 315 US 752, 86 L ed 1166, 62 S.Ct. 854."

See also *Myers* v. *Redding Co.*, 331 U.S. 477, 91 L ed 1615, 67 S.Ct. 1334.

[4] *Gunning* v. *Cooley*, 281 US 94, 74 L ed 724, 50 S.Ct. 231; *Jones* v. *Tennessee*, V. & G. R. Co., 128 US 443, 445, 32 L ed 478; *Tiller* v. *Atlantic* Coast Line R.R. Co., 318 US 55, 87 L Ed 618, 63 S.Ct. 444; *Bailey* v. *Central Vermont R.R. Co.*, 319 US 350, 87 L ed 1444, 63 S.Ct. 1062.

tional right to a jury trial and has substituted itself for the jury in re-examining and re-evaluating the evidence, weighing the credibility of witnesses, all on a printed record, in contravention of the Seventh Amendment; and it is respectfully submitted this petition should be granted for this reason alone as well as for the deprivation of petitioner's right to a jury trial accomplished through summary and definitive direction to the trial court to enter judgment for respondent, which forever bars her right to have her case decided by a jury.

3, 4. The Circuit Court of Appeals was without Constitutional right under the circumstances of this case to reverse the judgment of the trial court without granting a new trial, and if done under the authority of Rule 50(b) of the FRCP, such action contravenes the Seventh Amendment if that rule is intended to permit an appellate court to resolve conflicting evidence, select some of the permissible inferences therefrom, and to pass upon the credibility of witnesses not seen or heard by the appellate court. *Slocum* v. *New York Life Insurance Co.*, 228 US 364, 57 L. ed. 879, 33 S Ct 523; *Baltimore & C Line* v. *Redman*, 295 US 654, 79 L ed 1636, 55 S Ct 890; *Aetna Insurance Co.* v. *Kennedy*, 301 US 389, 81 L ed 1177, 57 S Ct. 809.[5]

Re-evaluation by an appellate court of factual matters cannot Constitutionally be substituted for a retrial by a new jury. Such retrial by a new jury is a Constitutional right of the highest value. *Slocum* v. *New York Life In-*

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[5] See *Galloway* v. *United States*, 319 U.S. 372, 392, 87 L ed 1458, 1473, 63 S.Ct. 1077, in which in a footnote it is said:

"We have not given special consideration to the latest decisions touching the Amendment's [Seventh] effects in the different situations where a verdict has been taken, on the one hand, without reservation of the question of the sufficiency of the evidence [citing Slocum], and, on the other, with such a reservation [citing B & C and Aetna Ins. cases]."

surance Co., supra. The most the Circuit Court of Appeals could possibly have done in this case was to have awarded a new trial. It is true in *Montgomery Ward & Co.* v. *Duncan*, 311 US 243, 85 L ed 147, 61 S. Ct. 189, the Court said that an appellate court might itself render judgment n. o. v. or reverse and remand for a new trial but the Constitutional question raised here appears not to have been involved in that case.[6]

The matter might be viewed in another fashion. Could the Circuit Court of Appeals, if the case were before it in that way, render a summary judgment under Rule 56 in favor of the respondent on this record?[7] Most assuredly it could not do so. *Sartor* v. *Arkansas Natural Gas Co.*,

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[6] Attention of the Court is respectfully invited to the annotation to the *Montgomery Ward & Co.* case, 85 L ed 155, 161, under the heading "Constitutionality of Rule 50(b)" in which it is said in part:

> "In view of the fact that Slocum v. New York L. Ins. Co. (1913) 228 US 364, 57 L ed 879, 33 S Ct 523, Ann Cas 1914D 1029, discussed supra, not only has not been overruled upon its facts, although not controlling so far as its dicta are concerned, but has been reaffirmed (Aetna Ins. Co. v. Kennedy (1937) 301 US 389, 81 L ed 1177, 57 S Ct 809, discussed supra), and in view of the fact that it was intimated in Baltimore & C. Line v. Redman (1935) 295 US 654. 79 L ed 1636, 55 S Ct 890, discussed supra, that consent of the parties is necessary to the reservation by the trial court of its decision on a motion for a directed verdict, the question arises as to whether the provision in Rule 50(b) that whenever a motion for directed verdict has been denied, 'the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion,' is in violation of the Seventh Amendment to the Federal Constitution."

The rest of the annotation, too long to reprint here, is illuminating. See also dissenting opinion in *Galloway* v. *United States*, 319 US 372, 87 L ed 1458, 63 S. Ct. 1077.

[7] So far as the Appellate Court was concerned it decided the case upon a printed transcript of record, which might just as well have been by documentary evidence under the summary judgment procedure.

321 US 620, 88 L ed 967, 64 S Ct 724, in which it was said:

> "Rule 56 authorizes summary judgment only when the moving party is entitled to a judgment as a matter of law, where it is quite clear what the truth is, that no genuine issue remains for trial, and that the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try."

Is not that reasoning analagous to the situation here presented because in effect the Circuit Court of Appeals has rendered a summary, definitive judgment in favor of the respondent? Would not this Court, if such summary judgment had been rendered, review and remand for a new trial—a jury trial?

Rule 50(b) of the Federal Rules of Civil Procedure cannot, of course, supersede the Seventh Amendment. It does not absolutely require the trial court to enter judgment notwithstanding the verdict even though it is persuaded it erred in failing to direct a verdict for the losing party. *Cone* v. *West Virginia Pulp & Paper Co., supra.* The rule, if applicable to an appellate court, is no more compelling upon it. It is to be emphasized the trial court did not reserve ruling upon respondent's motion for a directed verdict at the close of all the evidence but promptly denied it.

The Seventh Amendment restrains judicial domination of a jury by appellate as well as trial courts. The Circuit Court of Appeals Constitutionally in this case could have done no more than to return it for a new trial. *Slocum* v. *New York Life Insurance Co., supra; Baltimore & C Line* v. *Redman, supra; Aetna Insurance Company* v. *Kennedy, supra.*

The uncertainty left by the decisions as to the extent to which appellate courts, without trespassing upon the guarantees of the Seventh Amendment, in weighing evidence, passing upon credibility of witnesses, resolving conflicts in the evidence, selecting the inferences which may be drawn therefrom, all from a printed record, as well as the extent to which Rule 50(b) may be in contravention of the restraints and guarantees of that Amendment insofar as the rule may purport to authorize a reviewing court to direct the entry of a definitive, summary judgment, contrary to a jury verdict upheld by the trial court, are serious questions of national importance which should be authoritatively reviewed and settled. It may be many a day before an opportunity will be presented to this Court at least to set some limits upon a reviewing court's domination and preemption of the jury's historic function, because few will be emboldened to seek redress here in the ordinary common law civil jury case, if the decision of the Circuit Court of Appeals is upheld.

The common law civil jury system is on trial here. There is no better body of persons in the world to determine facts than an American jury. It is doubtful whether there is any better tribunal for determining facts in a common carrier or bus negligence action than an American metropolitan jury, who live in the world of affairs and travel in busses or motor vehicles probably every day of their lives. If decisions on the disputed factual matters presented in this case cannot be entrusted to them but may be resolved contrary to their view, as well as to that of the trial court who was never in doubt about the sufficiency of the evidence, by an appellate court upon a printed record, then the jury function in the Constitutional sense is a fiction.

Petitioner was severely and permanently injured. The jury awarded her the sum of $20,000. That has been

taken away from her and she has not even been afforded the right of a new trial.

It is respectfully submitted the questions raised on this petition should be considered on their merits with the benefit of full brief and oral argument, particularly in view of the national importance of the proper administration of justice in civil jury trial cases.

CONCLUSION

A rehearing of the order denying the petition for a writ of certiorari should be granted and on such rehearing a writ of certiorari should be issued and the judgment below reversed.

Respectfully submitted,

DORSEY K. OFFUTT
Counsel for Petitioner

The undersigned counsel for petitioner herein hereby certifies that the foregoing petition is presented in good faith and not for delay, and such petition is restricted to the grounds above specified.

DATED: Washington, D. C. November 10, 1951.

DORSEY K. OFFUTT